

HUANG (Migration) [2019] AATA 6066 (21 October 2019)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mr MINQUAN HUANG

CASE NUMBER: 1724992

HOME AFFAIRS REFERENCE(S): BCC2015/2986031

MEMBER: Russell Matheson

DATE: 21 October 2019

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:

- cl.820.211(2) of Schedule 2 to the Regulations; and
- cl.820.221(1)(a) of Schedule 2 to the Regulations.

Statement made on 21 October 2019 at 8:35am

1. CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Spouse) – genuine and continuing relationship – joint bank account – joint household with shared responsibilities – plan and undertake joint social activities together – parties represent themselves to others people as being married to each other – companionship and emotional support – credible witness – marriage certificate provided – decision under review remitted

2.

LEGISLATION

Marriage Act 1961 (Cth)

Migration Act 1958 (Cth), ss 5, 65

Migration Regulations 1994 (Cth), r 1.15A, Schedule 2, cl 820.211, 820.221

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

3. This is an application for review of a decision made by a delegate of the Minister for Immigration and Border Protection to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
4. The applicant is a 41-year-old male national of China. He applied for the visa on 9 October 2015 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
5. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211 because the delegate was not satisfied the applicant was the spouse of the sponsor. The applicant seeks review of the delegate's decision.
6. The applicant appeared before the Tribunal on 17 October 2019 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor. The Tribunal hearing was conducted with the assistance of an interpreter in the Cantonese and English languages. The applicant was represented in relation to the review by his registered migration agent.
7. For the following reasons, the Tribunal has concluded that the **matter should be remitted for reconsideration**.

CONSIDERATION OF CLAIMS AND EVIDENCE

8. The issue in the present case is whether the applicant is the spouse of the sponsor as defined in s.5F of the Act.
9. The Tribunal has before it the applicant's file from the Department of Immigration (the Department); its own file; and a copy of the Department's decision provided by the applicant to the Tribunal.
10. The evidence the parties provided at the Tribunal hearing is recorded throughout this decision record.

Whether the parties are in a spouse or de facto relationship

11. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.
12. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion

about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

13. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The applicant provided a copy of the marriage certificate registered under the *Marriage Act 1961* indicating the applicant and sponsor were married at Beverly Hills, NSW, on 21 September 2015. There is no evidence before the Tribunal to indicate that the marriage is not valid. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).
14. In forming an opinion as to whether they are in a marital relationship and in considering whether they have a mutual commitment to a shared life as husband and wife to the exclusion of all others, whether their relationship is genuine and continuing, and whether they live together and not separately and apart on a permanent basis as defined in s.5F(2)(b)-(d), the Tribunal has had regard to all the circumstances of the relationship. This includes evidence of the financial and social aspects of the relationship, the nature of the applicant's and sponsor's household and their commitment to each other as set out in r.1.15A(3).
15. After careful consideration of all of the evidence before it, the Tribunal has reached the conclusion that it is satisfied the applicant is the spouse of the sponsor within the meaning of s.5F of the Act. Below, the Tribunal sets out its consideration of the evidence under the relevant aspects of matters it must take into consideration under r.1.15A(3), and the reasons for its decision.
16. The Tribunal had the benefit of the applicant's and the sponsor's oral evidence at the hearing and found their evidence to be detailed, consistent and overall, credible. The Tribunal gave all the evidence provided by the parties at the Tribunal hearing and evidence provided by the applicant to the Department and the Tribunal file due regard. The applicant provided a significant amount of additional documentary and photographic evidence to the Tribunal.
17. The Tribunal acknowledges the delegate's concerns set out in the primary decision record. The Tribunal discussed these with the applicant and the sponsor in the course of the hearing and the Tribunal is satisfied that the parties were credible witnesses. The delegate noted that the applicant was married to his ex-wife in March 2009 and the marriage ended in August 2013. The delegate noted that when the applicant married the sponsor and lodged his partner visa, he was in Australia as the holder of a subclass 457 visa as a dependant of his ex-wife.

Are the other requirements for a spouse relationship met?

18. Financial aspects

19. The Tribunal has considered the financial aspects of the relationship including any joint ownership of real estate or major assets, any joint liabilities, the extent of any pooling or sharing of financial resources, especially in relation to major financial commitments, whether any person in the relationship owes any legal obligation in respect of the other and the basis of any sharing of daily household expenses.
20. The parties told the Tribunal that they have a joint account with the Commonwealth Bank of Australia (CBA) that they utilise for their day-to-day living expenses and payment of bills.

The parties provided evidence of individual debit cards linked to the account. The applicant gave evidence his wages are deposited into the joint account. The sponsor stated that she has her own personal account and her income is utilised for the payment of the mortgage on the house where the couple are residing. She further stated the mortgage on the property is in her name only.

21. The parties had a sound knowledge and presented detailed and consistent evidence of their financial affairs, including income, bank accounts, daily living expenses, payment of utility bills and mortgage payments and employment.
22. The parties gave detailed and consistent evidence in relation to the financial aspects of the relationship. The parties' evidence is that they have no joint liabilities and no major assets such as property together. There is limited evidence before the Tribunal of pooling or sharing of financial resources or any ongoing financial obligations. There is no evidence before the Tribunal that one person in the relationship owes any legal obligation in respect of the other. The Tribunal accepts that the parties are prepared to share their financial resources and any ongoing or future financial responsibilities.
23. The Tribunal places moderate weight on this aspect of the relationship.

24. *Nature of the household*

25. The Tribunal has considered the nature of the household, including any joint responsibility for the care and support of children, the living arrangements and daily routine of the parties and the sharing of the responsibility for housework, to form an opinion as to whether the parties are living together and not living separately and apart on a permanent basis.
26. The applicant and sponsor stated that since the inception of their relationship as a couple they have jointly shared the household responsibilities. The parties gave evidence that they are currently living in a mortgaged property in Beverly Hills in N.S.W. They provided detailed and consistent evidence of their personal history, living arrangements and household responsibilities such as cooking, washing, cleaning, lawn mowing, taking out the garbage and grocery shopping and daily routine. The parties provided numerous documents and correspondence in their individual names for their current address at Beverly Hills. The Tribunal accepts that the sponsor owns the premises where the couple reside. They provided detailed and consistent evidence of their personal history, living arrangements and household responsibilities and the care and support for each other and the sponsor's adult children and each other's parents. The parties stated that they had notified government agencies that they were in a spousal relationship.
27. The Tribunal accepts that the parties live together and they have established a joint household and share the responsibility of the housework.

28. *Social aspects*

29. The Tribunal considered the social aspects of the relationship, including whether the parties represent themselves to other people as being married to each other, the opinions of friends and acquaintances about the nature of the relationship, and any basis on which the parties plan and undertake social activities.
30. The applicant provided a significant amount of additional documentary and photographic evidence of their social activities and travel together to the Tribunal. The applicant provided photos of himself and the sponsor with each other, and with friends and family in a number of social settings and at various events both in Australia and China. The Tribunal found the photographic evidence persuasive. The Tribunal finds that the relationship between the

applicant and sponsor is recognised and supported by the applicant's and the sponsor's families and their friends.

31. The Tribunal accepts that the relationship is socially recognised by family and friends and they represent themselves to other people as being married to each other. The Tribunal accepts that the parties plan and undertake joint social activities together. There are statements from third parties, including close family members, who express their view that the relationship is a genuine one. The Tribunal places considerable weight on the social aspects of the relationship.

32. Commitment

33. The Tribunal has considered the nature of the parties' commitment to each other, including the duration of the relationship, the length of time the parties have lived together, the degree of companionship and emotional support they provide each other and whether the parties view the relationship as a long-term one.
34. The parties claim to have first met each other in December 2014 when the applicant responded to an advertisement for a room to rent posted by the sponsor. As a result the parties' relationship developed over the ensuing months resulting in them marrying on 21 September 2015. The applicant provided a copy of the couple's marriage certificate. The Tribunal accepts the parties are lawfully married. To date, the parties have been in a relationship for a period of time exceeding four years.
35. The parties indicated to the Tribunal that they believe their relationship is a long-term one and they are focused on financial stability and repaying the sponsor's mortgage and they plan to purchase an investment property together as financial security for their retirement. The parties' stated that they are a mature aged couple who are soul mates, are genuinely in love with each other and are inseparable. The sponsor also provided documentation nominating the applicant as the beneficiary of his superannuation. The sponsor gave evidence that she has split her superannuation benefits between her children and the applicant. The parties provided evidence of the support and care (emotionally and physically) they provide to each other in sickness and health and to the sponsor's children and to their parents.
36. The Tribunal is satisfied that the parties see their relationship as stable, mutually supportive and a long-term one. The Tribunal considers their evidence with regard to their commitment to each other plausible, persuasive and genuine.
37. The Tribunal is satisfied the applicant and the sponsor derive a strong degree of companionship and emotional support from each other that is commensurate with a couple being in a genuine and continuing relationship. The Tribunal is satisfied the couple view their relationship as a long-term one.
38. The Tribunal is satisfied, having had regard to the totality of the circumstances and the evidence provided that the applicant and the sponsor have a mutual commitment to a shared life to the exclusion of all others. The Tribunal is satisfied their relationship is a genuine and continuing relationship and that they do not live separately and apart on a permanent basis.

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41. Findings

42. The Tribunal is satisfied, having had regard to the totality of the circumstances and the evidence provided at the hearing, that the applicant and the sponsor have a mutual commitment to a shared life to the exclusion of all others. The Tribunal is satisfied their relationship is genuine and continuing. The Tribunal is satisfied they live together and not separately and apart on a permanent basis. Having considered all the evidence and circumstances of the relationship as detailed above, the Tribunal is satisfied the parties were in a spousal relationship at the time of application.
43. The Tribunal is satisfied that the sponsor is not prohibited from being a sponsoring partner and continues to sponsor the applicant. The Tribunal is satisfied that the sponsor, at the time of the visa application and decision, was an Australian citizen who had turned 18.
44. The applicant's movement records provide evidence of him having been the holder of a Temporary Work (Skilled) (Subclass 457) visa at the time of application that was valid until 8 November 2015. He held this substantive visa upon applying for the Partner (Temporary) (Class UK) Subclass 820 visa on 9 October 2015. As the applicant lodged his visa application within 28 days of the relevant day (the day the visa ceased), further requirements in cl.820.211(2)(d) need not be met.
45. On the basis of the above the Tribunal is satisfied that the requirements of s.5F(2)(b)-(d) of the Act were met at the time the visa application was made and are met at the time of this decision.
46. Therefore the applicant meets cl.820.211(2) and cl.820.221(1)(a).
47. Given the findings above, the appropriate course is to remit the visa application to the Minister to consider the remaining criteria for a Subclass 820 visa.

48. **DECISION**

49. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:
 - cl.820.211(2) of Schedule 2 to the Regulations; and
 - cl.820.221(1)(a) of Schedule 2 to the Regulations.

Russell Matheson
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).